STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CITY BANK OF MICHIGAN/ILLINOIS, N.A. f/k/a FIRST OF AMERICA,

Plaintiff-Appellee,

v

GENE HAYDEN,

Defendant-Appellant.

UNPUBLISHED
January 28, 2003

No. 234045
Wayne Circuit Court
LC No. 00-035935-AV

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted an order affirming the 16th District Court in Wayne County's denial of his motion to set aside a default judgment and to reinstate his counterclaim. We reverse and remand for further proceedings.

I. Basic Facts and Procedural History

Plaintiff was the assignee of money owed under a contract between defendant and Bob Saks Oldsmobile (Bob Saks) for the purchase of a car. After defendant stopped making payments on the car, plaintiff pursued a claim in district court to collect money due on the contract. On May 11, 2000, plaintiff served defendant with the complaint. On June 16, 2000, pursuant to the parties' agreement, plaintiff filed an answer, affirmative defenses and a four-count counterclaim.[1] On August 2, 2000, the district court scheduled a pre-trial conference. In compliance with the district court's order, defendant filed a detailed pre-trial statement.[2] However, defense counsel failed to appear at the pre-trial conference because of her failure to calendar the event. As a result, a default against defendant was noted on the district court's register of actions. However, the unsigned entry on the register of actions simply states: "Reinstate prior judt – [defendant] failed to appear + dismiss c/c." Notice of entry of default was not sent to defendant, nor was his counterclaim dismissed.

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[1] Despite this agreement, a default was entered on June 12, 2000. This default was set aside by stipulation.

[2] From the record before us, it is unclear whether plaintiff filed a pre-trial statement.

The day after the scheduled pre-trial conference, August 3, 2000, defense counsel informed plaintiff's counsel that defendant would file a motion to set aside the default to be heard on August 16, 2000. Although the motion was not so filed or scheduled, plaintiff's counsel nonetheless appeared in court on August 16, 2000. There is no record or documentation as to what occurred in court on this date, and no entry was made on the register of actions. However, a default judgment was entered the next day, August 17 2000, for "non appearance default." It is undisputed that defendant did not receive notice that plaintiff would seek entry of default judgment on either August 16th or August 17th. Nor did defendant receive notice that the default judgment would be entered. Additionally, there was no order entered dismissing plaintiff's counterclaim.

On August 18, 2000, defendant filed the motion to set aside the default judgment and to reinstate his counterclaim. Defendant argued that the default judgment should be set aside for good cause and because defendant had a meritorious defense. Defendant claimed good cause based on the court clerk's failure to send him notice of entry of default as required by MCR 2.603(A)(2). Defendant also claimed that the default judgment should be set aside to prevent manifest injustice and because plaintiff would not be prejudiced if the default judgment was set aside.

In support of his argument that he had a meritorious defense, defendant asserted that Bob Saks engaged in fraud and misrepresentation by convincing defendant that what he was signing was a lease agreement, when, in fact, the document was a sales agreement. In addition, defendant claimed that Bob Saks had violated numerous provisions of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.

Plaintiff argued that defendant did, in fact, have notice of the entry of default, whether it came from the court clerk or not, because attorneys for both parties discussed the default on August 3, 2000, one day after the pre-trial conference. Plaintiff also argued that defendant's defense was not meritorious because any defenses he may have had should have been directed toward Bob Saks.

The district court denied defendant's motion to set aside the default and reinstate defendant's counterclaim. The district court stated:

> It's interesting to note that when we want to know—when we want to use the court rules for our benefit we use them. And when we look at the court rules and we don't use them, and we don't do what we're supposed to do in filing various things and appearing when you're supposed to appear, then it's a different story.
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> But it appears to me that Nat—the Plaintiff, National City Bank, has done everything they can to properly prosecute this matter and has been running into problems because of defense counsel. I'm going to deny the motion to set aside the default judgment.

The district court did not articulate or identify the "problems because of defense counsel" nor did the court address the merits of defendant's good cause and meritorious defense arguments. On

October 16, 2000, the district court entered an order denying the motion to set aside the default and to reinstate defendant's counterclaim.

Defendant appealed the district court's denial of his motion to Wayne Circuit Court. Defendant argued that the district court abused its discretion by denying defendant's motion to set aside default judgment and reinstate his counterclaim because it failed to address the appropriate considerations for setting aside a default judgment. Instead, defendant argued, the district court summarily denied defendant's motion for impermissible reasons that should not have entered the court's decision-making process.

Plaintiff countered, arguing that the district court did not abuse its discretion when it denied defendant's motion to set aside the default judgment and reinstate defendant's counterclaim. Plaintiff asserted that the district court's denial of defendant's motion was correct for the same reasons advanced before the district court.

The Circuit Court denied defendant's appeal ruling as follows:

> But I really cannot find that he abused his discretion *no matter what the merits of the defense are* because I'm sorry, I just find the standard to be very, very difficult.. . . I think that the standard is wrong. The standard is wrong. For me to say that, I can't even remember the language anymore because it's so, the language is almost scurrilous that he not only defied logic in the common sense, he ruled perversely, that's the word they used, that he ruled perversely. I can't find that. The standard should be different and that's why I invite the appeal but his decision below is affirmed until I know that there was an abuse of discretion and I cannot find that there was.

II. Standard of Review

This Court reviews a trial court's decision to grant or deny a motion to set aside a default or a default judgment for an abuse of discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). An abuse of discretion involves more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). An abuse of discretion occurs only when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of reason but rather of passion or bias.'" *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Public policy in Michigan favors the meritorious determination of issues and encourages the setting aside of defaults. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 86; 578 NW2d 326 (1998). However, the policy of this state is also generally against setting aside defaults that have been properly entered. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

III. Defaults and Default Judgments

Pursuant to MCR 2.603(A), a court may enter a default against a defendant who fails to "plead or otherwise defend" in an action when that fact is made to appear by affidavit or

otherwise. In district court, the court clerk must send notice of entry of default to the defaulted party. MCR 2.603(A)(2)(a). After a default is entered, the party seeking a default judgment must give notice before requesting entry of default judgment. MCR 2.603(B)(1). Notice must be served "at least 7 days before entry of the requested judgment." MCR 2.603(B)(1)(b). Only if the default is for failure to appear at a scheduled *trial*, is notice not required. MCR 2.603(B)(1)(d).

"A motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). Good cause consists of: (1) a procedural defect or irregularity; or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, supra* at 233. In addressing whether a default should have been set aside, a court must also consider whether failure to do so would result in manifest injustice. *Id.* Manifest injustice is the result that would occur if a default were allowed to stand after a party has demonstrated good cause and a meritorious defense. *Id.* If a party puts forth a meritorious defense and then attempts to establish good cause by showing a procedural defect or a reasonable excuse for failure to comply with the requirements that led to the default, the strength of the defense will affect the showing of good cause that is necessary. *Id.* If a party states a meritorious defense that would be absolute if proven, a lesser showing of good cause is required to prevent manifest injustice. *Id.*

IV. Analysis

Defendant argues that the district court abused its discretion in denying his motion to set aside the default judgment and reinstate his counterclaim because it did not decide his motion on the basis of good cause and the filing of a meritorious defense pursuant to MCR 2.603(D)(1). We agree.

A. Meritorious Defense

As instructed by our Supreme Court, courts should be cautious not to blur the meritorious defense and the good cause requirements, which are separate. *Alken-Ziegler, supra* at 229-233. Defendant claims that he has several meritorious defenses, including that Bob Saks engaged in fraud and misrepresentation and violated the MCPA. Defendant submitted an affidavit stating that he worked as a grocery bagger and that he told the Bob Saks salesman he wanted to lease the car, not buy it, because of his low wages. The MCPA provides in pertinent part that unfair trade practices include where a party to a contract causes confusion or misunderstanding as to the obligations of another party to the contract. The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and is liberally construed to achieve its intended goals. *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000). The clear legislative intent of the MCPA is to protect consumers in the purchase of goods and services. *Id.* Under the facts asserted by defendant, the salesman caused confusion as to his obligations under the contract; thus, defendant has a claim for a violation of the MCPA.[3]

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[3] Plaintiff could be liable for the MCPA violation as an assignee. An assignee stands in the shoes of the assignor and acquires the same rights that the assignor possessed. *Professional*
(continued…)

Defendant also asserts fraud as a defense to which plaintiff also would be subject. Common-law fraud consists of the following elements: (1) defendant made a material representation, (2) the representation was false, (3) defendant knew that it was false when made or made it recklessly, as a positive assertion, without knowledge of its truth, (4) defendant intended plaintiff to act upon the representation, (5) plaintiff acted in reliance on it and (6) plaintiff suffered injury as a result. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997).

Defendant asserts that the salesman made a material representation that the contract was for the lease, not the purchase, of the vehicle. Defendant contends that the salesman knew that the contract was for a vehicle purchase and intended that he would act upon the representation. In his affidavit, defendant avers that he acted in reliance upon that representation and that he now has suffered damages in the amount paid on the contract. Accordingly, defendant has stated a meritorious defense of fraud.

B. Good Cause

Having presented a meritorious defense, defendant must also show good cause to set aside the default.

Here, nearly every procedural step leading up to entry of the default judgment was improper. It is undisputed that the court clerk did not send defendant notice of entry of default as required by MCR 2.603. MCR 2.603(A) provides in relevant part:

> (2) Notice of the entry must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.
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> (a) *In the district court, the court clerk shall send the notice*.
>
> (b) In all other courts, the notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court. (Emphasis added).

The entry of a default provides the basis for the entry of a default judgment. Therefore, the notice provisions for a default must be complied with *before* the entry of a default judgment.

"Failure to notify a party of an entry of default constitutes a violation of MCR 2.603(A)(2) and is sufficient to show a substantial defect in the proceedings meriting a finding of good cause pursuant to MCR 2.603(D)." *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503

(…continued)

Rehabilitation Assoc v State Farm Mutual Auto Insur Co, 228 Mich App 167, 177; 577 NW2d 909 (1998). Likewise, an assignee is subject to the same defenses as the assignor would have been. *First of America Bank v Thompson*, 217 Mich App 581, 588; 552 NW2d 516 (1996). Therefore, plaintiff is subject to the same defenses to which Bob Saks would have been subject.

NW2d 714 (1993). Even if defendant was notified of the default through other means, he was not provided with notice that a default judgment would be sought as required by MCR 2.603(B)(1)(a). Nor was defendant provided with the seven days' notice before entry of the requested judgment as required by MCR 2.603(B)(1)(b). Because trial was not scheduled for August 16, 2000, the court's failure to provide defendant with the required notice is not excused. MCR 2.603(B)(1)(d).

Furthermore, other than missing the scheduled pretrial conference, defendant was attentive to the defense of this case. Defendant not only filed an answer with affirmative defenses, but a four-count counterclaim as well. Additionally, defendant does not appear to have intentionally shirked his duty to appear at the pretrial conference because he timely filed a detailed pretrial statement. Defendant's notification to plaintiff's counsel that he would initiate a motion to set aside the default, to be heard on August 16, 2000, was not, in and of itself, improper. Nor was there any impropriety in defense counsel's delay in filing the motion. This telephone call could not have caused prejudice to plaintiff as plaintiff's counsel never received an actual motion or notice of hearing with the date of August 16, 2000. MCR 2.119. Thus, plaintiff's counsel's appearance at court on August 16, 2000, while perhaps diligent and commendable, does not appear to have been caused by impropriety on defendant's part.

Therefore, we find that the facts of this case support a finding that good cause exists to set aside the default judgment and that manifest injustice would result if the default judgment against defendant were allowed to stand. The district court's finding to the contrary does not appear to be based on the pertinent facts of the case nor the proper legal considerations and, therefore, was an abuse of discretion.

C. Failure to Defend

The district court defaulted defendant for nonappearance at a pretrial conference. Default for failure to attend a pretrial conference or a settlement conference is governed by MCR 2.401(F):

> (F) Failure to attend; default.
>
> (1) Failure of a party or the party's attorney to attend a scheduled pretrial conference, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).

"A default for 'failure to defend' is the defense version of a dismissal for 'want of prosecution' by a plaintiff, and should be entered only under similar extreme circumstances." 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed), pp 376-377. As discussed above, where defendant filed an answer, affirmative defenses, a counterclaim, and a detailed pretrial statement, but defense counsel merely neglected to calendar the pretrial conference, we cannot find a "failure to defend." Furthermore, on this record, there is insufficient factual support for the district court's reasoning that plaintiff was "running into problems because of defense counsel" meets the threshold of "extreme circumstances".

D. The Circuit Court's Ruling

Defendant also argues that the circuit court erred by affirming the district court's denial of defendant's motion to set aside the default judgment. Defendant points to the circuit court's characterization of the standard of review to support his argument that the circuit court did not properly analyze defendant's appeal from the district court. The circuit court referred to the abuse of discretion standard as a "high hurdle, "a ridiculous standard," "the wrong standard," and also stated that when an appellate court reverses a lower court by finding an abuse of discretion, it is "a very bitter pill to swallow." In addition, the circuit court judge stated, "I really cannot find that he abused his discretion no matter what the merits of the defense are because I'm sorry, I just find the standard to be very, very difficult." While the circuit court was correct in its characterization of the standard as high and difficult, *Alken-Ziegler supra* at 227, it erred by not considering the merits of defendant's appeal.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio